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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ANTHONY BROWN,

Defendant and Appellant.

D053951

(Super. Ct. No. SCD210931)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Reversed in part and affirmed in part as modified.

A jury convicted James Anthony Brown of three counts of pimping (Pen. Code,¹ § 266h, subd. (b); counts 1, 2 & 5), three counts of pandering (§ 266i, subd. (a)(2); counts 3, 4 & 6), and one count of unlawful sexual intercourse with a minor (§ 261.5, subd. (c); count 7). Based on his admissions, the trial court found true that Brown had suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and had served two prior prison terms (§ 667.5, subd. (b)). After denying Brown's motion for new trial, the court

¹ All statutory references are to the Penal Code unless otherwise specified.

sentenced him to prison for a total of eight years, consisting of the low term of three years doubled under the three strikes law for count 1 plus two one-year enhancements for the prison priors, with the remaining terms for the other counts running concurrently to count 1.

Brown appeals, contending the evidence was legally insufficient to support his convictions in counts 3, 5 and 6 and the trial court committed reversible error in denying his new trial motion based on grounds he received ineffective assistance of counsel, in admitting evidence of his bad character, and in sentencing him to concurrent terms on multiple counts of pimping and pandering instead of staying them under section 654. Brown also claims the cumulative effect of the trial errors denied him due process and a fair trial. The People concede counts 5 and 6 and their respective sentences must be reversed and vacated and that the sentences imposed for counts 3 and 4 must be stayed under section 654. We agree with such concessions. Accordingly, we reverse counts 5 and 6, together with the sentences imposed, require the sentences for counts 3 and 4 to be stayed pursuant to section 654, and in all other respects, affirm as modified to reflect the appropriate sentence.

BACKGROUND FACTS

At approximately 9:00 p.m. on December 27, 2007, Detective Scott Barnes of the San Diego Police Department, who was patrolling El Cajon Boulevard in an unmarked car, observed a man standing outside a car in the parking lot of the Kragen Auto Parts store (Kragen's), an area well known for pimps and prostitutes. Barnes saw the man walk away from the car, leaving the door open, and walk toward the passenger side of the car,

as another male got out of the driver's seat of the car, and leave the area in a truck. After that, the man got back into his car and drove off. Because Barnes was concerned that the man was involved in illegal activity, he began following him and requested assistance in making a traffic stop. After the man was observed making several moving Vehicle Code violations, uniformed officers in a marked patrol car pulled him over.

At the time of the stop, there were two young, scantily dressed females, later identified as Rosita M. and C. P., inside the car driven by the man observed by Barnes, who was identified at that time as Brown. Rosita initially gave Barnes a false name and said she was 18 years old, but later admitted her true name and that she was only 16. C. told Barnes she was 13. The two girls were then transported to the police station where they were separately interviewed by San Diego police officer Terence Charlot. After initial denials, Rosita told Charlot that Brown was her pimp, that he had provided her with instructions on prostituting, and that she had given him the money she made while prostituting. She also told the officer that she considered Brown to be her boyfriend. C. told Charlot that Brown knew she was only 13 years old because she had told him her age, that he was her pimp and that she also gave him money from her prostituting.

The following day, Brown was arrested on El Cajon Boulevard. During a search of his person and his car, the arresting officers found eight cell phones, a box of condoms, women's shoes, and a CD entitled "Snoop Dogg Hustler, Diary of a Pimp." The officers also located a camera in the car, which contained photos of Rosita and C. in various "sexual positions." Brown was subsequently charged with the instant crimes and proceeded to jury trial.

In addition to the above evidence, at trial the prosecution presented the testimony of Rosita and C., who had both been given grants of immunity, and the testimony of a San Diego police officer who was essentially an expert on pimping and prostitution in San Diego on El Cajon Boulevard.

In Rosita's testimony, she explained she was 15 years old when she met Brown, who was 34 years old, at an Oceanside gas station around September 2007. After a few weeks of hanging out every other evening, Rosita, who had dropped out of the 10th grade, asked Brown how she could make some money. In response, Brown told her she could either deal drugs or become a prostitute, opining that prostitution would be better for her, and explaining what it would entail.

According to Rosita, Brown made prostitution "sound easy" and promised her he would take care of her by providing food and clothing if she began a life of prostitution. When she agreed to become a prostitute, he more fully explained the "rules of prostitution" to her, telling her she was always to give him her money, always use a condom, never talk to other male pimps, and avoid African-American customers because they were more likely to rape females. He additionally told her to make certain that a potential customer was not a police officer by asking the customer to expose his "private part" or to touch her. Brown also told Rosita the "going rates" for the services she was to provide, gave her a key to his car and instructed her to place the money she earned in the car's middle console.

After taking her to El Cajon Boulevard, where he pointed out pimps and prostitutes to her, Brown took Rosita to Oceanside for her first day as a prostitute. That

day, she ultimately earned \$60, which she gave to Brown, for giving a man a "blow job" in his vehicle. After two days working in Oceanside, Rosita packed a bag with some clothing and traveled with Brown to San Diego to work on El Cajon Boulevard. On her first day there, she made \$150, which she gave to Brown "[b]ecause [she] had to" in order for him to take care of her. She continued to work every day there, with Brown deciding what hours she would work as he waited inside a nearby bar. Rosita would contact him using a cell phone before and after a date and then place the money she had earned in the center console of his car. When other pimps harassed her, he would approach them and they would back off.

During this time, Brown and Rosita stayed in motels, with Brown paying for the rooms with money she made. He additionally used the money to help provide her with food and buy her clothing, including high heels and a miniskirt, as well as purchasing gas and a newer car for himself. Rosita said that she had originally told Brown she was 18 years old, that they had sexual intercourse while she was still 15 years old, that he gave her the day off on her 16th birthday in November 2007 when she told him her true age, and that she continued to have sexual relations with him and also work for him as a prostitute after that time. Rosita considered Brown as a boyfriend.

Rosita further testified that in late November or early December 2007, she met C., a 13-year-old runaway, at a bus stop on El Cajon Boulevard where she attempted to recruit her into prostituting by explaining how easy it was and providing her with the "rules." Later that evening, she and Brown discussed prostitution with C. and Brown

repeated the rules to her, including telling C. she would have to put the money she made in his car when she was done.

In C.'s testimony, she confirmed meeting Rosita late at night at a bus stop on El Cajon Boulevard and that Rosita had talked to her about prostituting and had introduced her to Brown who had talked further with her about working with them. She also began staying sometimes with Rosita and Brown at the motel, estimating she had hung out with them about a week before starting to work for Brown. Like Rosita, after her dates, she would place the money she earned in Brown's car. According to C., Brown basically paid for her food and clothing and gave her some of the money back that she had made. After a few weeks, she "chose up" and went with another pimp, but she eventually returned to Brown and worked with Rosita while he hung out at the bar.

During questioning, C. stated that she thought she had already been "prostituting" before she met Rosita "[b]ecause like those times when I ran away, sometimes if I was out there, guys would just hook me up, and stuff, and let me stay in their house for a night" and she would have sex with them and sometimes they would give her money as well as let her stay for the night. C., however, did not mention that she had done any of this to Rosita.

On cross-examination, C. conceded she had intentionally gone to El Cajon Boulevard, but said she did not go there to make money. Although she had heard from other girls about prostituting on El Cajon Boulevard before she had talked about it with Rosita at the bus stop, she had not gone there to do that because she "didn't know what to do." C. explained that she also did not know how much she could get paid there because

every time she ran away guys would just hand her money, give her food and let her sleep in their houses because they felt sorry for her.

San Diego Police Sergeant Linda Oberlies basically testified as an expert regarding pimping and prostitution on El Cajon Boulevard. After noting it was very uncommon for a prostitute not to have a pimp, Oberlies explained that a pimp will generally give his prostitute very specific rules about the type of sex acts to perform and the amount to charge, and will give her a cell phone so she can contact him before and after a "date." Oberlies also explained that a pimp will sometimes have more than one girl working for him on El Cajon Boulevard, with the principal girl being referred to as the "bottom bitch," who is responsible for recruiting other girls to the pimp's "stable," and who usually has sexual relations with the pimp. Oberlies stated that the most common type of pimp found on the streets in San Diego is a "finesse pimp" who forms an emotional bond with the girls in his stable.

Oberlies opined that minors recruited into prostitution are oftentimes runaways that "have nothing else," and that the girls fall prey to the life style because the pimp will take care of them. She also believed that the items discovered in Brown's car and on his person at the time of his arrest were consistent with items encountered during her investigations of pimping, noting that the "Snoop Dogg" CD was the soundtrack for a movie that is used as a pimp "training tool."

Defense Case

Brown testified in his own defense. He stated that in December 2007, he worked at the Cricket Bar as a doorman/bouncer on El Cajon Boulevard. He also had earned

over \$55,000 at Pala Casino in 2007 and would get money from his family if needed. He had a girlfriend and four daughters. Brown claimed he had met Rosita at a party in Oceanside, who introduced herself by another name at the time and said she was 18 years old. He began letting Rosita stay with him at a motel after several weeks because she had "nowhere else to go," and she helped pay for the room. Brown did not know or think about where she got her money. He denied having sex with her, denied telling her anything about prostitution, and denied giving her a cell phone to use. Although he occasionally helped Rosita out when she was being bothered by other men, Brown denied he ever saw her engaging in prostitution.

Brown also testified that he did not believe C. was a prostitute. Rather he just thought she was a runaway "little girl" who hung out with him and Rosita several times at the motel to have someplace to stay. Brown stated that he was in the process of driving C. home after running into her at Horton Plaza and stopping by Kragen's to have his brakes fixed when he was stopped by the police on December 28, 2007. Brown conceded he had several prior felonies because he was helping someone.

On cross-examination, in response to questions about his gambling winnings, Brown said he had W-2s at his house to show some of his winnings, including one for \$29,000, but that he did not have receipts for all of the winnings. He conceded he had not shown the documents of his winnings that he had to his attorney. Brown also acknowledged that he paid no child support for any of his four daughters, but explained that he was "active" in three of the daughters' lives, the other being in foster care, and paid what was needed to take care of them.

In his defense, Brown also called the bartender at the Cricket Bar to the stand. Although she testified that Brown was paid "under the table" for helping her close the bar for several months in late 2007, she had no records of what she paid him because she considered Brown a patron and not an employee. A defense investigator who had interviewed Rosita also testified that she had told him Brown was "a loving, considerate and caring person."

The defense additionally called Rosita as a witness, designating her testimony as further cross-examination, to lay the foundation for playing those portions of her recorded interview with the police for the jury, which highlighted her various denials that Brown was her pimp and her acknowledgements that she recruited and instructed C. about prostituting. On redirect, the prosecutor played the entire recorded tape of the interview in which Rosita eventually changed her story and admitted she had originally denied everything about Brown's involvement because she did not want to get him in trouble.

DISCUSSION

I

SUFFICIENCY OF THE EVIDENCE

Brown originally contended that there was insufficient evidence to support his convictions in counts 3 (pandering with regard to C.), 5 (pimping with regard to Rosita) and 6 (pandering with regard to Rosita). Because pandering and pimping are continuous conduct crimes (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1139), the People concede it was improper to break those crimes into two additional counts with regard to Rosita

who was also charged with the same conduct in counts 2 and 4 based on her becoming a year older, which only decreased the penalties for those crimes, and asks that they be reversed along with their sentences. We agree and reverse those counts and vacate their respective sentences. Consequently, we now only review Brown's claim there was insufficient evidence to support his count 3 pandering conviction.

In reviewing a challenge to the sufficiency of evidence, we " 'consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' [Citation.] We consider whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.]" (*People v. Romero* (2006) 140 Cal.App.4th 15, 18 (*Romero*).) In making this determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (Evid. Code, § 312.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the [jury's] verdict," we will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

As relevant to Brown's assertion of insufficiency of the evidence, in order to establish the crime of pandering in count 3 under section 266i, subdivision (a)(2), the prosecution was required to prove beyond a reasonable doubt that Brown "cause[d], induce[d], persuade[d] or encourage[d] [[C.], who is a minor] to become a prostitute." In order to do so, CALCRIM No. 1151 told the jury in pertinent part that the prosecution

must prove that, "1. [Brown] used promises or any device or scheme to cause or persuade or encourage or induce [C.] . . . to become a prostitute; [¶]AND [¶]2. [Brown] intended to influence [C.] . . . to be a prostitute." The instruction also told the jury it must find that C. was under the age of 16 years when Brown so acted and further defined a prostitute as "a person who engages in sexual intercourse or any lewd act with another person in exchange for money."

During deliberations, the jury sent a note to the court asking "[i]n regards to the charge of pandering . . . criteria #1 uses the term 'to become a prostitute.' What is the legal definition of 'become?' " With the agreement of counsel, the court responded that "the panel is directed to paragraph 7 of the CALCRIM instruction 200 beginning with the words: 'some words or phrases. . . " The seventh paragraph of CALCRIM No. 200 given the jury provided that:

"[S]ome words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

A short time later, the jury returned their verdicts, including a guilty verdict on the count 3 pandering count involving C. and specifically finding that she was under the age of 16.

Here, Brown does not contest the finding that C. was under the age of 16. Rather, relying on the recent case of *People v. Wagner* (2009) 170 Cal.App.4th 499 (*Wagner*), in which the court held as a matter of statutory interpretation "the crime defined by section 266i, subdivisions (a)(2) and (b)(1), does not occur when the person being 'induce[d],

persuade[d] or encourage[d]' by a defendant is *currently* a prostitute" (*Wagner, supra*, at p. 511), Brown asserts his conviction for count 3 cannot stand as the evidence showed C. was already working as a prostitute when she met him. Brown's reliance on *Wagner* is unwarranted by the evidence which is sufficient to support his count 3 conviction in this case.

As the above facts reveal, even though C. testified she believed she had somehow prostituted herself in the past by staying at men's homes in exchange for sex and sometimes money when she had run away other times, she did not testify, as Brown contends, that she was currently working as a prostitute on El Cajon Boulevard when approached by Rosita and Brown to join his stable. Contrary to the situation in *Wagner*, where the evidence plainly showed that the young woman solicited by the defendant to work as a prostitute for him was actually working as a prostitute at the time she was approached (*Wagner, supra*, 170 Cal.App.4th at p. 505), the evidence here was subject to different interpretations as to whether C. was currently working as a prostitute when she met Brown. In other words, it was a question of fact for the jury to determine whether C. was or was not a currently practicing prostitute or whether Brown induced, persuaded or encouraged her to "become" one.

C. specifically testified in this case that she had not gone to El Cajon Boulevard to make money because she "didn't know what to do." Nor did she ever tell Rosita or Brown that she had prostituted herself in the past and neither testified about having any knowledge or belief that C. was working as a prostitute at the time she was approached at the bus stop on El Cajon Boulevard, both merely considering her a young runaway. C.

stated it was a week after meeting Rosita and having several discussions with her and Brown about prostitution that she actually started to work for Brown on El Cajon Boulevard. In light of this evidence and the jury instructions, which were clarified by the court's response to the jury's note, the jurors could reasonably infer that C. was not "currently" a prostitute and that Brown had encouraged her "to become" a prostitute again. (See *People v. Bradshaw* (1973) 31 Cal.App.3d 421, 426.) We do not reweigh the evidence. Accordingly, we conclude there is sufficient substantial evidence to support Brown's count 3 pandering conviction.

II

NEW TRIAL MOTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

After the verdicts were returned and before sentencing, another attorney for Brown filed a motion for new trial alleging, among other things, that trial counsel was ineffective for failing to produce written records or documentation of Brown's gambling winnings to rebut the prosecution's suggestion that his only source of income was derived from pimping and pandering. In support of the motion, Brown attached documents from Pala Casino (W-2G's) reflecting winnings by Brown of approximately \$42,000, which he asserted were newly discovered since the time of trial, and argued that there was prejudice to him by counsel's failure to obtain and provide such documentation of his winnings because the prosecutor had made a "big deal" on cross-examination and in closing argument about the lack of any proof of his winnings. Because he had other income to support himself, Brown claimed the documented proof of his winnings would have proven to the jury that he did not live off the money Rosita and C. gave him and

would have impacted how the jurors viewed his credibility. He asserted it was more probable that he would have obtained a more favorable result had the jury been presented with such documentary evidence.

The prosecutor opposed the motion, arguing that the W2's were not newly discovered because their existence was known before trial and that they were not material to Brown's guilt or innocence. The prosecutor asserted the decision to not produce the W2's could be characterized as a tactical decision by "competent trial counsel" because the documents could have easily been turned against him and pertained to a collateral matter not going to guilt or innocence, bearing at most on Brown's credibility. Because the documents did not show how much Brown had lost at gambling during the same time period the W2's covered, the prosecutor opined he could have argued such point as well as stressing that Brown "had a gambling habit which he fed by pimping out underage girls."

After hearing further argument by counsel, the trial judge stated in pertinent part:

"Ladies and gentlemen, this is how I see it --the motion is denied, for the following reasons: There was absolutely no ineffective assistance of counsel in this particular case. This court obviously had the opportunity to hear the presentation by [defense counsel]. I certainly could find absolutely no fault with that. She was playing with a hand dealt her that was not terribly beneficial. Apart from that, there was nothing to suggest that the job was anything but professional. [¶] . . . [¶] I had an opportunity, of course, to hear the defendant testify in this case. Mr. Brown's testimony was not particularly believable. It was as simple as that. There was more than enough evidence to convict him in this particular case. [¶] I felt at the time I heard it -- my position had not changed -- that all the hullabaloo about Pala winnings and losings was a red herring on both sides. It was not a pivotal issue in this case. The section does not require that Mr. Brown derive all or a substantial part of his

income from pimping and pandering. That's not what was required. It was just that he be supported in part by money derived from this. And the evidence was clear that that was the case."

On appeal, Brown claims the trial court prejudicially erred by denying his motion for new trial on grounds of ineffective assistance of his trial counsel. No abuse of discretion is shown.

Generally, a trial court's ruling on a motion for new trial " 'rests so completely within [its] discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.' " (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) This standard "asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The burden is on the defendant to show that the trial court's decision was " 'irrational or arbitrary,' " or that it was not " 'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

In addition to the statutory grounds (§ 1181), a new trial may be granted where the trial court finds that the defendant received ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583.) "To prevail on this ground, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

produced a just result.' [Citations.]" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659-660.)

With regard to the first prong regarding counsel's performance, there is a "strong presumption" that defendant received reasonable professional assistance of counsel (*Strickland v. Washington* (1984) 466 U.S. 668, 689 (*Strickland*)), and a reviewing court will "defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) Further, "[i]f the record . . . fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must [generally] be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Even if there could be no satisfactory explanation for counsel's failure, " 'the reviewing court should not speculate as to counsel's reasons. . . . Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.)

Additionally, because a claim of ineffective assistance of counsel made in a new trial motion differs from one made for the first time on appeal, we usually defer to the trial court's initial determination as to whether trial counsel's tactical "acts or omissions were those of a reasonably competent attorney." (*People v. Jones* (1981) 123 Cal.App.3d 83, 89 (*Jones*)). This is because the trial court is generally in the best position to make

such determination based on having observed counsel's performance throughout the proceedings. (*Ibid.*)

As to the second prong, the defendant must show a "reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) Moreover, a reviewing court need not reach the question of deficient performance where defendant fails to demonstrate prejudice. (*Strickland, supra*, 466 U.S. at p. 697.)

Here, the record reflects the court specifically found that Brown's trial counsel's performance throughout the trial was not incompetent. In doing so, the court impliedly determined that Brown's counsel's tactical "acts or omissions were those of a reasonably competent attorney," which necessarily included any decision by counsel not to present documentation of a portion of Brown's gambling winnings. (*Jones, supra*, 123 Cal.App.3d at p. 89.) We defer to such determination, which is supported by the record, that shows there may have been sound tactical reasons for trial counsel not to present evidence from Brown's gambling winnings for which he conceded in his testimony could not fully be proven as he only had documents concerning the larger amounts he had won. Even though the prosecutor had cross-examined Brown about the lack of documentary evidence concerning his winnings and had argued the point during closing argument, she had also correctly pointed out the law that having other sources of income, no matter what the amount, was not a defense to the pimping and pandering charges. (See *People v. Coronado* (1949) 90 Cal.App.2d 762, 766-767.) The jury was additionally instructed

that "[g]ainful employment is not a defense to pimping and pandering. Nor is it a defense that the defendant had sufficient income from other sources. The amount of money received is irrelevant as long as the money or proceeds earned by a prostitute supported the defendant in whole or part." On this record, we cannot find that Brown made a prima facie showing on the face of the record that his counsel's performance was deficient. (*Strickland, supra*, 466 U.S. at pp. 687-688.)

Further, although the documentary evidence might have added something to Brown's credibility score, as the trial court found after reviewing the entirety of Brown's testimony, which it did not find particularly believable, and the strong evidence in support of his convictions as compared to the proposed evidence that he alleged should have been presented to the jury, Brown also could not demonstrate that there was a reasonable probability the jury would have returned a more favorable verdict. Even accepting as true that Brown had made nearly \$55,000 in gambling winnings from Pala Casino, as the trial court determined and the jury was instructed, such was basically irrelevant to his culpability of the charged crimes for which there was overwhelming evidence that he was using some money given to him by Rosita and C. from their prostituting to buy food, clothing and hotel rooms. Thus, on the facts of this case, we cannot say that the trial court's decision denying the new trial motion exceeded the bounds of reason under the applicable law and relevant facts. No abuse of discretion is shown.

III

ADMISSION OF IMPEACHMENT EVIDENCE

As earlier noted, in Brown's defense, his investigator testified that he had talked with Rosita who stated Brown was "a loving, considerate and caring person." When Brown next testified on his own behalf, he mentioned on direct examination that he had four daughters. On cross-examination, the prosecutor asked Brown questions about each daughter, who her mother was and whether Brown was paying any child support. When the court overruled Brown's relevancy objections to the questions, Brown conceded that he paid no child support for any of his four daughters he had with four different women.

On appeal Brown contends the trial court prejudicially erred by allowing the prosecutor to cross-examine him about the fact he has four daughters with four different women and does not pay child support. He argues such evidence of his bad moral character was irrelevant and its admission "placed a pall over everything that [he] said," such that the jury would have been "more inclined to believe [his] testimony and therefore have favored [him] with their verdict." We disagree.

Generally, although only relevant evidence is admissible at trial (Evid. Code, § 350) and evidence of a defendant's character or a trait of his character is not admissible to prove conduct on a specific occasion (Evid. Code, §§ 1101, subd. (a), 1102), when a defendant adduces testimony of his good character at trial, the prosecution may impeach the testimony or rebut it. (Evid. Code, § 1102, subd. (b).) However, if the impeachment or rebuttal of good character evidence "would create a substantial danger of undue prejudice to the defendant, the trial judge has the discretion to preclude [the evidence]

under Evidence Code section 352." (*People v. Hempstead* (1983) 148 Cal.App.3d 949, 954.) The trial court has broad discretion in making evidentiary decisions which we review under the abuse of discretion standard. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118.)

Here, by the time defense counsel objected to the prosecutor's questions regarding Brown's daughters, Brown had already placed his character in issue through the testimony of his investigator who had been called to testify about Rosita's opinion of Brown's good character, that he was "a loving, considerate and caring person." Brown had also portrayed himself in his direct examination as a family man with four young daughters. Because Brown had thus opened the character issue, the prosecutor was entitled to elicit evidence relevant or tending to impeach or rebut that "specific asserted aspect" of Brown's character. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791-792 (*Rodriguez*).)

Although the scope of impeachment or rebuttal character evidence must generally relate directly to the character trait it is intended to impeach or rebut (*Rodriguez, supra*, 42 Cal.3d at pp. 791-792), where the defense evidence portrays an overall picture of good character, which is "not limited to any singular incident, personality trait or aspect of his background," the scope of the impeachment or rebuttal character evidence likewise may also be more general in breadth. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1072.) Because Brown's own testimony and that of his investigator gave the broad and general impression that Brown was a kind, caring family man, we are satisfied that the trial court was well within its discretion to overrule Brown's relevancy objections and permit the

prosecutor to generally and broadly question Brown about the good family character he and his witness had portrayed. No evidentiary error is shown.

IV

CUMULATIVE ERROR

Brown further argues that even if we find the trial court's errors in denying the new trial motion and in admitting the impeachment evidence regarding his daughters were individually harmless, the cumulative effect of those errors requires reversal of the judgment as violative of his due process rights. Because we have found no error in either claimed instance of error, Brown cannot show cumulative error (*People v. Beeler* (1995) 9 Cal.4th 953, 994), or that he was denied due process or a fair trial. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.)

V

SECTION 654 CONCESSION

Finally, Brown contends, and the People agree, that the concurrent sentences imposed for pandering in counts 3 and 4 violated the proscription against multiple punishment under section 654 because they were incident to his one objective and single criminal intent of encouraging C. and Rosita to become prostitutes as a revenue source to finance his living expenses, which was already being punished under the pimping statutes.² We concur in this concession.

² Brown's original claim also included the concurrent terms imposed for counts 5 and 6. That claim is now moot as we have reversed those counts based on the People's earlier concession.

Section 654 prohibits punishment for two offenses arising from the same act. (§ 654; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all of a defendant's offenses "were merely incidental to, or were the means of accomplishing or facilitating one objective, the defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Here, it is clear from the totality of the record that the crimes of pimping as to each young girl (count 1 as to C. and count 2 as to Rosita) as well as the pandering counts 3 and 4 were all part of one common scheme to use C. and Rosita as prostitutes to earn money. Therefore, punishment for both the pimping and the pandering as to each girl is prohibited and the sentences on counts 3 and 4 must be stayed under section 654.

DISPOSITION

The counts 5 and 6 convictions, together with the sentences imposed on those counts, are reversed and vacated. The sentences imposed for counts 3 and 4 are stayed pursuant to section 654. As so modified, the judgment in all other respects is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect such

modifications and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.